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No. 96-1829

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1997

STATE OF MONTANA; MARY BRYSON;  
BIG HORN COUNTY; and MARTHA FLETCHER,

*Petitioners,*

v.

CROW TRIBE OF INDIANS; and  
UNITED STATES OF AMERICA,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**PETITIONERS' REPLY BRIEF**

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## INTRODUCTION

Respondents attempt in this Court to mix and match rights and remedies in a way that cannot withstand scrutiny. To be sure, they prevailed on a claim that the Montana taxes are preempted. The remedies for so prevailing were prospective relief and, at most, any consequential damages to respondent Crow Tribe caused by the taxes' application. But respondents already have received prospective relief, and, despite many years of litigation, they either despaired of proving or were unable to show any appreciable actual damages attributable to the taxes – a conclusion reflected in the record not only with respect to ceded-strip production by Westmoreland Resources, Inc. but also with respect to the failure of Shell Oil Company to develop the Youngs Creek Project.

It is thus not surprising that respondents opted to seek another form of recovery by shifting their focus to the monies obtained by petitioners from Westmoreland. The problem became how to lay claim to those funds. The answer was an amended complaint for monies had and received – a quasi-contract cause of action. Whatever plausibility such a claim may have had when initially advanced by respondents in 1989 and 1990 nonetheless was lost after this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

Because the quasi-contract claim is precluded, respondents now urge this Court to provide relief, which they christen "disgorgement," identical to that otherwise available under their all-but-abandoned quasi-contract claim as a remedial adjunct to the successful preemption claim. However, whether the issue is deemed to be the existence of a "cause of action" in quasi-contract (as petitioners urge in light of respondents' over-eight-year litigation strategy) or the "appropriate[ness]" of the "disgorgement" remedy as a part of the preemption claim (as respondents do presently) makes no difference to the outcome here; they are simply different characterizations of the same analytical inquiry. That inquiry leads to only

two conclusions: The relief awarded by the Ninth Circuit cannot be reconciled with the decisions of this Court or, for that matter, those of any other court and, if sustained, promises to usher in an entirely new and disruptive species of tax-recovery litigation.

## ARGUMENT

### I. CALIFORNIA GOVERNS THIS CASE.

Respondents recognize that this Court held in *California* that federal common law generally prevents a nontaxpayer from recovering in quasi-contract taxes paid by a third party. Brief for Respondent Crow Tribe ("Crow Br.") at 45-46; Brief for United States ("U.S. Br.") at 26-28. Respondents nonetheless advance three principal arguments as to why this case does not prohibit the Tribe from collecting taxes paid by Westmoreland. All are specious.

First, respondents' attempts to shrug off *California* as merely a "cause of action" case cannot withstand review. The core of respondents' position is this Court's statement in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992), that "the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." The term "cause of action" nevertheless has meanings other than that assigned by respondents. In *Davis v. Passman*, 442 U.S. 228, 273 (1979), this Court accordingly observed that a "cause of action" has been used by "courts and commentators . . . in the traditional sense established by the Codes to refer roughly to the alleged violation of 'recognized legal rights' upon which a litigant bases his claim for relief." See generally 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 148 (2d ed. 1990); William Witz Blume, *The Scope of a Civil Action*, 42 Mich. L. Rev. 257, 261 (1943).

This is precisely the formulation that applies to the use of the term "cause of action" in *California*. There, this Court held that the United States had not stated a claim lying in quasi-contract to recover taxes it had not paid. 507 U.S. at 756 ("[w]ithout an implied contract, an action for money had and received will not lie against the State"). *California* thus embodies a substantive determination of the standards by which liability in quasi-contract to nontaxpayers must be measured and prescribes the elements that condition availability of the precise remedy respondents seek (return of monies had and received) by virtue of the state taxes' preemption. To say, as the United States does, that it "has no bearing" on the claim here (U.S. Br. at 27) misses this critical point, since *California* prescribes the elements which condition availability of the very remedy respondents seek by virtue of the state taxes' preemption.

Second, respondents contend that in *California* the United States "was seeking relief not in its sovereign capacity, but rather simply by virtue of its contractual arrangements with a private party." U.S. Br. at 27 n.16; see also Crow Br. at 44-45. This contention cannot be squared with the Government's request in *California* for quasi-contract relief on the ground that "the disbursement of federal funds [was] involved." *California*, 507 U.S. at 752 (emphasis added). The requested relief was rejected not because the quasi-contract claim was being asserted by the United States in other than its "sovereign" capacity, but because no contract-at-law could be implied between *California* and the United States under the facts.

Third, respondents assert that *California*, unlike this case, involved a violation of state law. As petitioners previously demonstrated (Brief for Petitioners ("Pet'rs Br.") at 34-35), that was not the basis for *California*'s quasi-contract holding. This Court accorded no significance to the state-law basis of the United States' challenge to the tax but, rather, rejected the quasi-contract

claim on the ground that "California's demand that [the taxpayer] pay what California believed to be a lawful debt does not make California legally responsible for the Government's indemnification of [the taxpayer]." 507 U.S. at 756.<sup>1</sup>

**II. EVEN IF CALIFORNIA DOES NOT PRECLUDE RESPONDENTS' CLAIM AS A MATTER OF LAW, THE JUDGMENT BELOW STILL MUST BE REVERSED.**

Even were *California* not wholly dispositive of the claim to Westmoreland's taxes, respondents are still not entitled to the relief ordered by the court of appeals. Although contending that they have a cause of action which arises from the finding in *Crow II*<sup>2</sup> that Montana's coal taxes were preempted, respondents themselves recognize that the fact of preemption is not alone sufficient to entitle them to Westmoreland's state tax payments. Respondents accordingly concede that they must show that such a remedy is "appropriate." *Crow Br.* at 42; *U.S. Br.* at 22, 30. This concession is controlling.

**A. Common-Law Standards Govern the Exercise of Federal Remedial Rights.**

Respondents assert that federal courts have nearly limitless power to fashion relief but offer no real

<sup>1</sup> The United States' related assertion that "violations of state law can give rise only to state causes of action" (*U.S. Br.* at 29 n.18) also fails to account for the fact that this Court's analysis in *California* was grounded in principles derived from decisional authority – *Gaines v. Miller*, 111 U.S. 395 (1884), and *Bayne v. United States*, 93 U.S. 642 (1877) – which did not involve state law-based claims.

<sup>2</sup> *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987) (Pet. App. 88), *aff'd mem.*, 484 U.S. 997 (1988).

guidance for the exercise of that power. Certainly none of the decisions they cite supports the sort of restitutionary relief sought or holds that common-law principles governing the appropriateness of such relief should be discarded. It is instead well established that, in determining whether a remedy is appropriate, courts look to the common law and established legal principles. *See Pet'rs Br.* at 35-40.

The series of allotted-land property tax cases involving invalidation of state or local government assessments relied upon by the United States were brought by either the actual Indian taxpayer or the United States on the taxpayer's behalf to have taxes declared invalid and, in some instances, to recover taxes previously paid by the taxpayer. *U.S. Br.* at 23. These decisions therefore fall squarely within the traditional role assigned to claims for money had and received. *California*, 507 U.S. at 751. The other Indian-law decisions advanced by respondents – *United States v. Minnesota*, 270 U.S. 181 (1926), and *Heckman v. United States*, 224 U.S. 413 (1912) – were suits by the United States to set aside conveyances of tribal land allegedly made in violation of federal statutes and offer no guidance on the scope of a court's authority to award Westmoreland state tax payments to respondents simply by virtue of the preemption determination.

Respondents' heavy emphasis on *Maryland v. Louisiana*, 451 U.S. 725 (1981), is likewise misplaced. *Crow Br.* at 37-38; *U.S. Br.* at 33-34. There, several States filed an original proceeding in this Court challenging the validity of a Louisiana tax on oil and natural gas. Refunds also were sought as to the Louisiana taxes that the complainant States themselves had paid and the taxes paid by the States' consumers on whose behalf each State sued in its

parens patriae capacity. *Id.* at 736-39.<sup>3</sup> *Maryland* therefore offers no support for the notion that a State or other sovereign can recover for its *own* benefit taxes paid by another.<sup>4</sup>

Revealingly, respondents relegate to footnote treatment those cases that most directly address the issue of a federal court's power to fashion relief for a violation of federal law. Crow Br. at 42 n.29; U.S. Br. at 42 n.28. Respondents dismiss petitioners' reliance on these cases as reflecting "confusion regarding the difference between a federal cause of action and the relief afforded under it." Crow Br. at 43 n.29; *accord* U.S. Br. at 42 n.28. A careful review of these cases, however, makes plain that it is

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<sup>3</sup> Indeed, *Maryland* is quite problematic from respondents' perspective to the extent it recognized the petitioner States' parens patriae standing for the purpose of recovering taxes on behalf of their consumer residents. There, the legal incidence of the Louisiana tax fell on the individual consumers who could "not be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small" – i.e., the incidence of the tax did not "fall on a small group of citizens who are likely to challenge the Tax directly." 451 U.S. at 739. The same cannot be said here. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847 (Mont. 1980), *aff'd*, 453 U.S. 609 (1981).

<sup>4</sup> The other "disgorgement" decisions from this Court upon which respondents rely are inapposite for the same reason. *Snepp v. United States*, 444 U.S. 507, 514-16 (1980), held that where damage to national security from breach of contract was unquantifiable, a constructive trust would be imposed on proceeds from a book whose publication constituted breach. This Court's decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), concluded only that a federal court had authority to award amounts paid in excess of rent-control limits to the administrator of the Office of Price Administration who sued to recover those amounts on behalf of the overcharged tenants.

respondents who are "confused" regarding the scope of a federal court's remedial powers.

In *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), the Court started with the premise that the defendant had violated the Williams Act. Nonetheless, the Court concluded that the plaintiff was *not* entitled to the relief it sought because the plaintiff had failed to satisfy the "traditional equitable principles" necessary for the requested relief. *Id.* at 61. The Court reached the same conclusion 30 years earlier in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), where the defendant admitted it had violated a federal statute but nevertheless argued the injunctive relief was inappropriate. This Court agreed, declining to grant the United States' requested remedy because the relief would mark "a major departure from . . . tradition." *Id.* at 329-30.

*Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), further supports the rule that federal courts ordinarily must tailor remedies to established common-law principles. This Court thus summarized the core of *Deckert's* holding in *Rondeau* in the following manner: "[T]he conclusion that a private litigant could maintain an action for violation of the 1933 [Securities] Act means no more than that traditional remedies were available to redress any harm which he may have suffered; it provided no basis for dispensing with the showing required to obtain relief." 422 U.S. at 63 (emphasis added). Put otherwise, the mere existence of a cause of action to enforce a federal right does not dispense with the obligation to justify any relief sought or awarded by reference to "traditional," or common-law, standards.

No less remarkable, lastly, is the Tribe's attempt to embrace and simultaneously to distinguish *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996). While conceding the Court held there that "courts in equity must be governed by rules and precedents no less than the courts of law" (*id.* at 1298), the Tribe asserts, citing *Albemarle Paper Co. v.*

*Moody*, 422 U.S. 405 (1975), that those "rules and precedents" do not include established common-law standards. Crow Br. at 43 n.29. *Albemarle* says nothing of the sort. To the contrary, this Court in *Albemarle* stated, as quoted earlier in the Tribe's own brief (Crow Br. at 28-29), that "when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'" 422 U.S. at 417.

**B. The Award Ordered by the Ninth Circuit is Illogical and Contrary to Settled Common-Law Standards.**

Viewed in light of established common-law principles, the relief awarded by the Ninth Circuit is plainly inappropriate. The Ninth Circuit, at bottom, ruled that because it had previously decided in *Crow II* that the Tribe had suffered at least "some" harm from Montana's preempted coal taxes, the Tribe was, as a matter of law, entitled to the full amount of the taxes paid by Westmoreland. While the prospective relief already awarded to respondents is common (see *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 113-14 (1989) (Kennedy, J., dissenting)), the retrospective relief sought by respondents is unprecedented. The reasons for the absence of such authority are not difficult to fathom.

Most fundamentally, the judgment below is irreconcilable with common-law privity requirements – i.e., the requirement that recovery be limited to the benefit which the plaintiff conferred upon the defendant. See *Pinter v. Dahl*, 486 U.S. 622, 647 n.23 (1988). The Tribe did not pay the taxes at issue and had no contractual obligation with the actual taxpayer, Westmoreland, that would allow it to stand in Westmoreland's shoes. See Crow Br. at 24 n.17 (disclaiming subrogation claim). The only party with a claim to the state taxes was Westmoreland, but it forfeited

any claim to the taxes first by failing to initiate state-law tax refund procedures and then through a settlement. J.A. 294; see Pet. App. 37 (FOF ¶ 61).

Respondents' answer that common-law quasi-contract principles do not require privity is designed solely to mislead. Crow Br. at 43-46; U.S. Br. at 32-33. They cite in support of this contention several state court cases including, most importantly, *Valley County v. Thomas*, 97 P.2d 345 (Mont. 1939), where one local government entity was permitted to sue another to recover taxes that, by statute, were required to be paid to the plaintiff entity. Those cases do not bear the weight placed upon them, not only because in each instance the state statute required the taxes to be paid to the plaintiff rather than to the defendant but also because a necessary predicate for recovery by the plaintiff was the validity of the tax itself.<sup>5</sup> Such a contention additionally is incompatible with this Court's ruling in *California* that there is no federal common-law cause of action for money had and received for taxes paid by a third party.

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<sup>5</sup> More specifically, in *Valley County* the court was presented with the question of whether automobiles, whose taxable situs lay in the Fort Peck townsite, should have been licensed by Valley rather than McCone County. In resolving this question, it was necessary for the Montana Supreme Court to determine if the townsite, given its location on federal land, had been removed from the state's taxing jurisdiction. After lengthy analysis the court held taxing authority did exist. 97 P.2d at 364. No contention has been, or could be, made that the Tribe was the intended beneficiary of the state tax statutes – a fact the district court in this case recognized in its conclusions of law rejecting respondents' reliance on *Valley County*. Pet. App. 49-50 (COL ¶ 25). The situation here, moreover, is that which would have arisen had the Montana Supreme Court reached an opposite conclusion on the jurisdictional issue: Neither county would have been entitled to the taxes, and only the taxpayers could have sought their recovery.

Beyond failure to satisfy privity requirements, the "scope of the remedy" here is *not* consistent with "the scope of the violation established." *Califano v. Yamaski*, 433 U.S. 682, 701 (1979) (emphasis added); see also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (reversing relief ordered in school desegregation case where "the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court"). The only "violation" shown presently is preemption through operation of the Omnibus Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (Supremacy Clause "is not source of any federal rights").<sup>6</sup> That violation has already been remedied by prospective relief prohibiting petitioners from collecting the severance and gross proceeds taxes from Westmoreland. Consequently, the sole unremedied

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<sup>6</sup> In *Crow II* the court of appeals also relied upon interference with tribal sovereignty interests in holding the state taxes preempted. 819 F.2d at 902-03 (Pet. App. 105-07). That aspect of the decision at best is superfluous, since the determination that the taxes were preempted under the Mineral Leasing Act not only made the latter basis for the decision unnecessary but, had preemption not been found under the Act, also would have foreclosed a contrary finding under the tribal self-government principles. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) ("in examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue"). In any event, this Court's summary affirmance merely approved the court of appeals' judgment, "and no more may be read into [this Court's] action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983). There appears, as well, no reason the Ninth Circuit's judgment would be more defensible even were it predicated exclusively on the sovereignty-infringement ground.

injury the Tribe could have suffered was diminished royalties. Any lost royalties, however, had no logical or, more to the point, record-based relationship to the amount of the taxes paid by Westmoreland. The record in this case instead demonstrates, even in the Ninth Circuit's view, only that "the taxes had at least some negative impact on the coal's marketability." *Crow II*, 819 F.2d at 900 (Pet. App. 100).<sup>7</sup>

**C. The United States' Contention That, but for the State Taxes, Westmoreland Would Have Paid Taxes Under the 1976 Tribal Tax Code Ignores the District Court's Contrary Findings.**

The United States posits as fact that, but for Westmoreland's opposition to approval of the tribal tax ordinance's application to the ceded strip during the review process before the Department of the Interior, the ordinance would have been approved for such application. U.S. Br. at 48 n.33. Nothing in the record supports this assertion, since nonapproval was premised on the Tribe's constitution, as the district court expressly found, not Westmoreland's unwillingness to be taxed. Pet. App. 36-37 (FOF ¶ 59).

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<sup>7</sup> Respondents rely on footnote 17 in *Cotton Petroleum* and associated text, 490 U.S. at 186 & n.17, for the proposition that the Montana taxes imposed a "substantial burden" on the Tribe. *Crow Br.* at 29-30; U.S. Br. at 10, 14-15. The Court's analysis in the footnote nonetheless referred only to the Ninth Circuit's conclusion that the taxes had a negative impact on the tribal coal's marketability and to the United States' characterization of the tax rates as "extraordinarily high." Like the court of appeals' analysis in *Crow II*, this Court's analysis distinguishing the two cases says nothing relevant to the monetary amount of any impact on marketability from the taxes. See *Carey v. Piphus*, 435 U.S. 247, 264 (1978); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

No less unhelpful is respondents' reliance (Crow Br. at 5; U.S. Br. at 48 n.33) on the district court's July 1988 ruling for the proposition that the Department's approval of the tribal tax with respect to the Crow Reservation extended to the ceded strip, notwithstanding the explicitly contrary limitation in the agency's determination (J.A. 281, 286). Respondents fail to mention that the district court clarified in its November 1994 decision the fact that the earlier order related only to the propriety of releasing escrowed funds to the Tribe on the basis of the September 1982 lease amendment and that the order itself addressed the issue of whether Westmoreland had any obligation to the Tribe under the 1976 tax ordinance. Pet. App. 36 (FOF ¶ 59); see also Pet. App. 53-54 (COL ¶ 34). Even more important, the district court found that "Westmoreland would not have paid any amounts under the Tribe's 1976 tax code." Pet. App. 36 (FOF ¶ 59). Respondents neither challenge this finding nor suggest any party contended prior to 1988 that the tribal tax had been approved unwittingly by the Department for application to the ceded strip.<sup>8</sup> In sum, Westmoreland did not pay the

<sup>8</sup> The lack of any contrary suggestion by respondents merely reflects the record, which established unequivocally that the lower courts and the parties recognized the 1976 tribal tax had not been approved for application to the ceded strip. See *Crow Tribe v. Montana*, 650 F.2d 1104, 1115 n.19 (9th Cir. 1981) (Pet. App. 192 n.19), amended, 665 F.2d 1390 (1982); *Crow II*, 819 F.2d at 897 (Pet. App. 93); *Crow Tribe v. Montana*, 657 F. Supp. 573, 586-87 (D. Mont. 1985) (Pet. App. 143-44 (FOF ¶ 114)); J.A. 97-98 (second amended complaint, ¶ 30, filed Sept. 29, 1978); J.A. 205-06 (Westmoreland's counterclaim filed Dec. 23, 1982 seeking recovery of all state taxes paid for production prior to Sept. 29, 1982); J.A. 129 (memorandum of Tribe's attorney dated Apr. 8, 1982). Indeed, the parties stipulated in the pretrial order entered by the district court in connection with the 1994 trial that "[i]n February 1977, the Department's Acting Commissioner of Indian Affairs approved the [taxation] code

tribal tax because, along with respondents, it believed no obligation existed to do so.

The United States further refers to the court of appeals' statement in *Crow IV* that "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976" (*Crow Tribe v. Montana*, 92 F.3d 826, 830 (9th Cir. 1996) (per curiam) (Pet. App. 12), amended, 98 F.3d 1194 (1997)) as support for the contention that, but for the state taxes, the Tribe would have collected taxes under the 1976 taxation code from Westmoreland. U.S. Br. at 48. The Ninth Circuit's conclusion was based on a letter dated March 30, 1976 from Charles E. Brinley, then Westmoreland's president, to the Tribe's chairman. J.A. 87.<sup>9</sup> The significance

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for application within the exterior boundaries of the Reservation but withheld approval with respect to coal production within the ceded strip based on a limitation in the Tribe's Constitution." J.A. 329.

<sup>9</sup> Referring to conversations during 1974 negotiations that resulted in an amended lease that year, the letter read in part:

When the amended leases were negotiated between Westmoreland Resources and the Tribe, Westmoreland Resources granted to the Tribe all of the financial advantages Westmoreland Resources could afford both from the point of view of its ability to price your coal competitively and from the point of view of Westmoreland's ability to earn a reasonable return on its investment. During the course of those negotiations, the Westmoreland representatives did express a willingness to pass on to the Tribe any amounts by which the burden of the expected state tax could be reduced by the exercise of whatever governmental powers the Tribe may have had over the ceded strip. That was the only context in which the subject of a tribal tax was discussed and we thought it was understood that the terms of the

accorded Brinley's letter was plainly incorrect since, as the letter itself indicated, the Tribe elected to enter into the 1974 lease amendment that contained no provision of the kind mentioned by Westmoreland during the earlier negotiations. Brinley emphasized, moreover, the need for Westmoreland to pass the tribal tax on to its utility customers – a requirement that could not be satisfied without Department of the Interior approval of the tax for application to ceded-strip production. Thus, as the district court found, even had the state taxes not been in place, Westmoreland would not have paid taxes under the 1976 tribal taxation code. To the extent the court of appeals may have reached a contrary conclusion based on Brinley's letter, it exceeded its appellate authority. See, e.g., *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

### III. RESPONDENTS' ALTERNATIVE THEORIES FOR RECOVERY ARE NO MORE PRINCIPLED THAN THE NINTH CIRCUIT'S ANALYSIS.

Respondents make no effort to defend the court of appeals' reasoning but instead offer differing theories to justify their "disgorgement" remedy. The Tribe proposes a three-part inquiry,<sup>10</sup> while the United States tries to

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amended leases were to be the final economic settlement between us.

J.A. 87-88. The letter stated further that the Tribe should consider "reinstating efforts with the Montana Legislature to gain an appropriate share of the current Montana tax" and that Westmoreland "stands ready to work with you in this regard, provided that there would be no increase in the overall tax and provided that the full cost of any proposed arrangement could be passed along to Westmoreland's customers." J.A. 88.

<sup>10</sup> "[W]hether the disgorgement remedy in favor of the Tribe is appropriate here is governed primarily by the answers

recast the decision below more to its liking. U.S. Br. at 41 ("[t]he Ninth Circuit applied the well-settled equitable principle that, when an injunction has been entered to prohibit the unlawful acquisition of property, a second injunctive decree may be entered to require the wrongdoer to disgorge any unlawfully obtained profits").<sup>11</sup> Neither theory is consistent with established legal principles governing the scope of a federal court's remedial powers and, accordingly, neither proposed standard provides a principled basis for awarding relief in this, or any, case. Rather, either proposed standard, if credited, would create a new, extraordinarily broad form of recovery in one of the most sensitive areas of the federal-state relationship.

1. The Tribe grounds its remedial test in selected quotations from various decisions including, most importantly, *Albemarle* and *Franklin*. Crow Br. at 27-29. In *Albemarle* and *Franklin*, however, the entitlement to back pay or damages was limited to the individuals who *actually* suffered the claimed loss – not, as here, a third party –

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to the following questions: (i) will the remedy correct the wrong done to the Tribe?; (ii) will the remedy effectuate the purposes of the laws violated by the State and the County?; and (iii) will the remedy promote compliance with, and deter violations of, the laws that were broken?" Crow Br. at 29.

<sup>11</sup> The United States suggests that common-law constructive trust principles independently support recovery but cites no apposite authority for this proposition. U.S. Br. at 34-35. The difference between quasi-contract recovery and a constructive trust remedy lies in the nature of the judgment sought. *Restatement of Law of Restitution* § 160, cmt. a (1937); 1 George E. Palmer, *Law of Restitution* § 1.3, at 13 (1978); see also 1 Dan B. Dobbs, *Law of Remedies* § 4.3(2), at 590, 596 (2d ed. 1993). It is unsurprising, therefore, that neither the parties nor the courts below suggested that relief on constructive trust grounds was appropriate even if quasi-contract relief was not. See 92 F.3d at 828-29 (Pet. App. 8-9); Pet. App. 43 (COL ¶ 5)); J.A. 339-42.

and the amount sought was the *actual* monetary value of the loss – not, as here, some fixed amount unrelated to such loss. The remaining decisions relied upon by the Tribe are similarly unsupportive of its theory.<sup>12</sup>

The Tribe's three-part inquiry really consists of two components, since the second factor – "will the remedy effectuate the purpose of the law" – and the third factor – "will the remedy promote compliance with . . . the law[ ]" – are little more than a reformulation of one another, and effectively permit a court to award another's taxes to an aggrieved third party whenever, having found the tax invalid under federal law, it concludes such a remedy will correct the "wrong" done to the complainant. If there is a "wrong," however, the more appropriate remedy lies in using a traditional damages remedy that tailors the amount of the relief to the actual injury done by virtue of the federal law violation. See *Franklin*, 503 U.S. at 75-76. The Tribe's approach, like the Ninth Circuit's, "turns each equity chancellor's conscience" into "a measure of equity" (*Lonchar*, 116 S. Ct. at 1298) without the organizing hand of common-law principles. The Tribe's argument, in short, is simply that it should get the taxes

<sup>12</sup> *Mills v. Electric Auto-Lite Co.*, 396 U.S. 365 (1970) (whether determination that misstatement or omission in proxy statement is material establishes cause of action under the Securities Exchange Act); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (whether derivative right of action exists under § 14(a) of Securities Exchange Act); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (whether lost wages arising from discharge in retaliation for exercising rights under Fair Labor Standards Act could be recovered in suit by Secretary of Labor); *Bell v. Hood*, 327 U.S. 678 (1946) (whether district court had jurisdiction over complaint alleging violation of the Fourth and Fifth Amendments and seeking damages); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) (whether district court required to issue injunctive relief once violation of Emergency Price Control Act of 1942 was shown).

because it would be unfair for petitioners not to "disgorge" amounts equal to the taxes. But Westmoreland is the only party that arguably had a claim to the taxes; it has had its day in court; and it has departed the fray. Even if *California* does not preclude the Tribe's claim *ab initio*, it certainly supports the proposition that there are no compelling equitable considerations to allow a nontaxpayer, like the Tribe, to recover taxes paid by a taxpayer, like Westmoreland, that has abandoned its own claim.

Given the district court's findings, moreover, the Tribe's theory even if correct does not advance its cause. The trial court – which would be principally vested with the responsibility to exercise informed discretion concerning whether the remedy sought will "correct the wrong done" and will "effectuate the purposes" of relevant statutes (see, e.g., *City of Los Angeles v. Manhart*, 435 U.S. 702, 728 (1978) (Marshall, J., concurring in part); *Zenith Radio Corp. v. Hazeltine, Inc.*, 395 U.S. 100, 123 (1969)) – *did* consider both the effect of the state taxes on the Tribe's relationship with Westmoreland (Pet. App. 51-52 (COL ¶¶ 28-30)) and the "[f]ederal policy favor[ing] tribal self-government and economic development" (Pet. App. 45 (COL ¶ 11)) but concluded that the requested relief was not warranted because, *inter alia*, Westmoreland "would not have paid coal taxes to the Tribe" regardless of whether it had state tax obligations (Pet. App. 35 (FOF ¶ 57); "the Tribe provided little or no governmental services to the Ceded Strip" (Pet. App. 38 (FOF ¶ 65)); petitioners "have always provided public services on the Ceded Strip" (*id.*); petitioners would provide such public services even in the absence of Westmoreland's mining operations (Pet. App. 38 (FOF ¶ 64)); and petitioners "have not received benefits from the Tribe nor has the Tribe given benefits to [petitioners]," (Pet. App. 49 (COL ¶ 24)). While the court of appeals chose to ignore these findings on law-of-the-case grounds (92 F.3d at 829-30 (Pet. App. 9-12)), to the extent deference is

owed in the lower courts' assessment of the "appropriateness" of the relief sought with respect to the factors identified by the Tribe, it is to the district court. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

The "standard" proposed by the United States is equally open-ended. Tellingly, the Government cites only *Porter* in support of the standard's appropriateness. U.S. Br. at 41. That case, however, involved a claim by a federal official seeking an injunction against a landlord's violation of rent control ceilings and recovery of amounts paid in excess of those ceilings on behalf of the overcharged tenants. This Court held the rent-recovery aspect of the relief within the remedial grant of injunctive authority under Section 205(a) of the Emergency Price Control Act of 1942 because it was an appropriate adjunct to the issuance of an injunction restraining violation of the Act. 328 U.S. at 399-401. Thus, *Porter* might provide some support for the United States' theory if the Government were proceeding on behalf of *Westmoreland*, but it is not. *Westmoreland* instead pursued recovery of its own tax payments and settled that claim with petitioners.

2. Respondents' attempt to minimize the practical and federalism significance of the ad hoc, standardless species of "disgorgement" liability they propose cannot be accepted. Crow Br. at 47-50; U.S. Br. at 44-46.<sup>13</sup> Rather

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<sup>13</sup> The United States remarks that it cannot be "plausibly . . . suggested" that the Government "has taken an unrestrained approach here" or that "it will not exercise [the power to bring suit in federal court] responsibly in the future." U.S. Br. at 46. Petitioners, and their amici curiae (Brief for Nat'l Conf. of State Legislatures et al. at 2, 20-21; Brief of Amici Curiae States of New York et al. at 8), take little comfort in these representations in view of federal trust responsibilities to Indian tribes, but even if the United States were never again to institute a suit comparable to that here and the Eleventh Amendment or 28 U.S.C. § 1341 otherwise forecloses federal court suit, nothing

than acknowledging that the award ordered by the Ninth Circuit raises substantial federalism concerns, respondents simply choose to pretend there is nothing extraordinary in a judgment requiring respondents to turn over \$58 million in taxes, and to incur potential liability for prejudgment interest multiple times the principal amount, to a party that did not pay them, even though the party that did pay the taxes unquestionably has no entitlement to them. See Crow Br. at 47-50; U.S. Br. at 44-47. This Court nevertheless has emphasized that where a remedy will "intrude into the proper sphere of the States," a court's remedial power should be exercised "only sparingly, subject to clear rules guiding its use." *Missouri v. Jenkins*, 510 U.S. 70, 131 (1995). This is particularly true when the remedy, in practical effect, is a tax refund claim and where, as a matter of both state law and the Due Process Clause, the actual taxpayer had adequate remedies to pursue a refund. See *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 117 S. Ct. 1776, 1779 (1997); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1989).

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precludes a Tribe or other aggrieved nontaxpayer from seeking recovery of taxes paid by a third party in state courts which, in turn, would be bound to honor federal law principles in resolving the claim. See *Felder v. Casey*, 487 U.S. 131, 151 (1988).

## CONCLUSION

For the foregoing reasons and those set forth in petitioners' opening brief, the judgment of the court of appeals should be reversed.

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